AH837-S

IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC 1985, c L-2.*

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (SYSTEM COUNCIL NO. 11)

(IBEW)

-and-

CANADIAN NATIONAL RAILWAY COMPANY

(CN)

Dispute: The Reinstatement of Roger Moses

Arbitrator: Graham J. Clarke
Date: August 27, 2024

Appearances:

IBEW:
M. Church: Legal Counsel
J. Sommer: Senior General Chairman, IBEW System Council No. 11
B. McCue: Regional Chairman - CN GLD, IBEW System Council No. 11
S. Martin: International Representative, IBEW
R. Moses: Grievor

CN:
P-L. Montgrain: Labour Relations Manager
M. Boyer: Sr. Manager, Labour Relations
J. Varga: S&C Manager
G. Kong: OHS Nurse Case Manager
D. Forlini: OHS east team leader

Arbitration held via videoconference on August 21, 2024.

Award

BACKGROUND

1. On October 30, 2023, the arbitrator issued AH837[1] which concluded that CN did not have just cause to terminate Mr. Moses' employment. Mr. Moses had had 22 years seniority when CN dismissed him on August 3, 2022.

2. To justify the termination, CN relied solely on an employee's email attributing certain comments to Mr. Moses, which, if proven, would cause anyone significant concern. However, in his Statement taken pursuant to the collective agreement's investigation procedure, Mr. Moses categorically denied making those remarks.

3. In AH837, the arbitrator explained why an email from an employee, without anything further, prevented CN from meeting its burden of proof to justify the termination of a long service employee [footnotes omitted]:

> 62. As noted in the introduction, CN did not meet its burden of proof in this case. It had the obligation to demonstrate, on a balance of probabilities, that Mr. Moses' had made the comments which led to his dismissal. Mr. Moses denied making them. CN asked the arbitrator to discount his evidence taken pursuant to article 13.1 of the collective agreement and prefer Mr. Lambert's email.
>
> 63. CN did not persuade the arbitrator to come to this conclusion. On what basis can the arbitrator prefer an email over the evidence Mr. Moses gave during an investigation?
>
> 64. CN could have taken steps to resolve this crucial evidentiary conflict. As noted above, it could have required Mr. Lambert to provide a statement during the investigation. Another option involved conducting a supplementary investigation. In rare cases where credibility remains a lynchpin issue, the parties could agree to present oral evidence at the hearing.
>
> 65. These methods would have provided the arbitrator with a full Record on which to resolve the crucial evidentiary conflict in this case.
>
> 66. Given that CN did not demonstrate that Mr. Moses made the comments which led to his termination, the arbitrator must allow the IBEW's grievance.

[1] International Brotherhood of Electrical Workers (System Council No. 11) v Canadian National Railway Company, 2023 CanLII 99782

Given this scenario, the extensive submissions about the appropriate penalty lose their relevance.

4. The arbitrator ordered CN to reinstate Mr. Moses[2]. However, relying on Mr. Moses return to work physical which contained certain permanent restrictions, CN did not reinstate him back into his original position. Instead, CN offered Mr. Moses three different non-bargaining unit positions to address its duty to accommodate.

5. The IBEW argued that Mr. Moses' medical restrictions had existed for a long time, but never prevented him from performing his duties as an S&C Maintainer position in the MacMillan Yard (Mac Yard). The IBEW maintained that CN never considered whether it could accommodate Mr. Moses' permanent restrictions in his home position.

6. For the reasons which follow, the original reinstatement order stands.

CHRONOLOGY OF KEY FACTS

7. The arbitrator will highlight certain key facts arising from the parties' Record.

8. June 29, 1998: Mr. Moses started working for CN. For over 20 years, he worked as an S&C Maintainer at the Mac Yard.

9. October 2013: Due to a knee injury, Dr. Murray Wilson put Mr. Moses on modified duties from October 2, 2013 to April 14, 2014[3]. Dr. Wilson described the 3 restrictions:

- Avoid – Rough ground walking, greater than 20 min
- Avoid – Repetitive movement of the involved joint against resistance
- Avoid – Low level activities (squatting, kneeling, bending, crawling)

10. January 8, 2020: CN had conducted a physical demands analysis[4] for the position of an S&C Maintainer at Mac Yard.

11. November 7, 2023: CN compensated Mr. Moses as ordered in AH837[5].

[2] AH837 at paragraph 71.
[3] CN Documents, Tab 3. IBEW Documents, Tab 3.
[4] CN Documents, Tab 5.
[5] CN Brief, Paragraph 10.

12. January 4, 2024: As part of the reinstatement process, Mr. Moses' physician completed various medical Forms[6] CN had requested. The Forms stated under "Fitness for Duty":

> Fit for modified/alternate duties from 2024/01/04 to indefinite "as he has already had these restrictions for years and is not expected to change"[7].

13. For the Forms' questions about "Operating Machinery and Work Environment, the physician ticked the box "yes" for Fit to Drive Vehicle, "yes" for Fit to Operate Equipment/Heavy Machinery and "no" for Safety Concerns (attention and/or vigilance and/or cognition). For the 2 "yes" answers, the physician added the handwritten note "cannot drive manual transmission as cannot hold down the clutch".

14. February 29, 2024: Dr. Michael Tomizza wrote to CN[8] and provided his conclusion that Mr. Moses could perform his S&C Maintainer duties:

> In conclusion, to the best of my knowledge and based on information provided to me, including the position description accompanying the musculoskeletal assessment form, **I do not see a medical reason as to why Mr. Moses cannot continue in his position of Signals and Communication Maintainer. I would recommend that he return to this position without further delay and with the aforementioned restrictions in place, with the clarification that kneeling/squatting/crouching is not absolutely forbidden but rather should be minimized and avoided if and when possible**. If any new concerns were to develop in the future (e.g. new symptoms, worsening knee pain, etc.) that were possibly impacting his ability to perform his duties safely and/or effectively, it would be my recommendation that reassessment should occur at that time.
>
> (Emphasis added)

15. March 5, 2024: CN advised Mr. Moses of 3 non-bargaining unit accommodated positions and offered to forward his name to the recruiting department:

> Hi Roger,

[6] IBEW Documents, Tab 4.
[7] IBEW Documents, PDF page 32/191.
[8] IBEW Documents, Tab 5.

> My name is Carole Cousineau and I'm part of the Return to Work group at CN. **I'm reaching out to discuss your return to work in an accommodated position.**
>
> **We currently have a few positions posted that meet your physical requirements including: Reservations Associate (req12395) and Associate Planner (req12377), both in Brampton, ON, as well as a Crew Dispatcher (req12386) role in Edmonton, AB.** Please let me know if you are interested in these positions by end of day Wednesday, March 6, 2024 and I will forward your name to the recruiting department immediately.
>
> You can obtain additional information relating to these positions on CN's career website athttgs://www.cn.ca/en/careers. If there are other suitable positions you feel you can do, please let me know…
>
> (Emphasis added)

16. March 7, 2024: The parties emailed the arbitrator and booked August 21, 2024 for a supplementary hearing about Mr. Moses' reinstatement.

17. March 15, 2024: In the Occupational Health Services' (OHS) medical notes produced to the IBEW[9], Mr. Moses advised the nurse of the following (emphasis added):

> **PC with EE this date**
> **EE mentioned that he didn't have to do crouching/kneeling at work for past 9 years.**
> Action possibly requiring crouching/kneeling were:
> - File shunting (new tools are used now: magnetic file shunt) that doesn't require him to be in a crouching/kneeling position
> - Adjusting switch machine
> - Hook up circuit rail.
>
> **In the situation if he requires to hold the position for a short period of time, he would be able to do it with no difficulty – EE mentioned that he has held this position for the last 9 years and has been executing his physical task by alternating his body positioning.**
> **EE would like to be able to show the function on how he can perform his task without any issues.**
> Update sent to CMO for discussion.

[9] IBEW Documents, Tab 9.

18. March 22, 2024: The OHS Case Notes[10] refer to the possibility of a field assessment (emphasis added):

> Meeting with CMO (interim) Dr. Laprade and OHS TL David F.
> No change to restrictions.
> Determine if field assessment can be done.
> Meeting with Carole C., Laura W. (claims), Pier-Luc (LR) and David F. (OHS TL)
> **No change in restriction. Field assessment suggested but EE has had no proof given to LR that he has had these restrictions before.**
> **File will most likely proceed with arbitration to discuss restrictions.**

19. March 22, 2024: In the OHS Medical Notes, the nurse wrote (emphasis added):

> CMO response:
> **The restrictions remain the same.**
> **Also, EE reports that he has been accomplishing 100% of his job's duties within those restrictions for the past 9 years without any issues.**
> **It was confirmed that there are no performance issues by EE's (prior) supervisor, manager and senior manager in 2024/1.**
> Meeting booked with David F. (OHS TL) and Dr. Laprade (CMO interim) to discuss file.
> Charting to be continued in reinstatement service.

20. March 26, 2024: Mr. Moses had advised CN he wanted to return to his home position. Ms. Carole Cousineau, Senior Manager, Workers' Compensation | Corporate Services, advised him[11] that she had determined his original position exceeded his physical capabilities:

> I hope this email finds you well. I am writing to follow up on our conversation held on March 7, 2024, regarding your potential return to work with the company.
>
> During our discussion, we reviewed your current functional capabilities and explored possible positions within the company that align with your work restrictions. As per CN's medical records, you are unable to crouch, kneel or drive a manual transmission. The medical information also indicated that you are unable to walk on uneven ground for more than 30 minutes at a time. These restrictions are considered permanent. **While acknowledging these restrictions, you expressed confidence in your ability to fulfill your full duties as a Signals and Communication Maintainer**.

[10] IBEW Documents, Tab 8.
[11] CN Documents, Tab 4.

> **I informed you that the medical did not support a full return to work and CN had several available positions, including two roles in Brampton, ON, and one in Edmonton, AB**. However, you indicated that family obligations would make commuting to Brampton challenging, requiring over three hours of travel each day. Similarly, relocating to Edmonton was not feasible due to familial considerations. You also indicated that new medical information was sent to Occupational Health Services (OHS) that may change your work restrictions.
>
> **On March 22, 2024, OHS confirmed that your restrictions remain unchanged. Upon reviewing again your current medical work restrictions, I have determined that resuming your previous role as a Signals and Communication Maintainer exceeds your physical capabilities, rendering it unsafe for you to return to that position. Therefore, it is my responsibility to assist you in finding alternative suitable employment**. However, at present, we do not have any suitable openings within the parameters outlined by OHS in your area of preference. I will actively continue to explore opportunities in your area of choice which is the MacMillan Yard. If at any time you are willing to reconsider working at the Brampton Yard and/or relocate to a larger center where sedentary work is more readily available, please let me know.
>
> You expressed a preference for working Sunday to Wednesday on day shift from 0600 to 1600, mirroring your previous schedule. While I will prioritize finding roles with similar schedules, accommodation may not always align with preferences given your current restrictions. I recommend considering alternative personal solutions that would allow a more flexible work schedule while I search for suitable employment opportunities.
>
> (Emphasis added)

21. March 28, 2024: CN, which had indemnified and returned Mr. Moses to payroll, stopped compensating him[12] when he did not accept any of the three positions offered to him.

ARBITRATION PROCEDURE AND ORAL EVIDENCE

22. For this ad hoc arbitration, the parties had agreed that they would follow the November 1, 2023 Canadian Railway Office of Arbitration & Dispute Resolution Rules[13] (Rules). Paragraph 11 in the Rules describes the hearing process:

> 11. The arbitrator shall not decide a dispute without a hearing. Each party attending a hearing shall submit to the arbitrator and the other party a written

[12] CN Brief, Page 10.
[13] CROA Rules

> statement of its position together with the evidence and argument in support thereof a minimum four (4) business days (Monday to Friday) in advance of the scheduled hearing.
>
> Upon receipt of the arbitration briefs, if necessary, each party will follow up with the submission of a written rebuttal a minimum two (2) days in advance of the hearing. Replies will be limited to three (3) pages.
>
> Hearings will be scheduled for one-hour duration to allow each party to present their arguments, which includes no more than fifteen (15) minutes for rebuttal, if necessary, in order to ensure timely, expedited hearings.
>
> **In cases involving witnesses, hearings will be scheduled for ninety (90) minutes duration and allowing each party forty-five (45) minutes to present its arguments, including rebuttal. The parties will be required to notify the Office of Arbitration when a witness will attend no later than 10 business days after the schedule has been released.**
>
> (Emphasis added)

23. During the hearing, the IBEW objected to CN's request to have one of its representatives testify. In its view, CN had failed to provide the required 10 business day notice under paragraph 11 of the Rules. CN suggested the evidence would provide helpful context and should be allowed.

24. The arbitrator upheld the IBEW's objection. Paragraph 11 of the Rules divides hearings into those which will have witnesses and those which will not. If a party desires to lead oral evidence, which is sometimes crucial when there is a fundamental factual dispute, then the parties' Rules require 10 business days notice. This prevents one party from gaining a distinct advantage by adding oral evidence without notice and ensures the fairness of the short, expedited hearing to which the parties have agreed under the Rules.

25. The parties remain free at any hearing to agree between themselves to lead oral evidence or to consent to the other's request to call a witness[14]. But, absent an agreement or consent, if a party objects, then paragraph 11 in the Rules prevents oral evidence when a party has failed to provide 10 business days notice.

[14] AH878 - International Brotherhood of Electrical Workers, System Council No. 11 v Canadian Pacific Kansas City Railway, 2024 CanLII 57803

ANALYSIS AND DECISION

Introduction

26. In advance of the hearing, the arbitrator referred the parties to AH822[15] which had examined an arbitrator's residual jurisdiction after ordering an employee's reinstatement. As demonstrated by the parties' Briefs and oral submissions, the parties did not pursue this issue. Instead, they both asked the arbitrator decide this current dispute on the merits.

27. The parties' Joint Statement of Issue[16] (JSI) described the issue:

> Application of the award of Ad Hoc Award 837, specifically whether Roger Moses is medically fit to be returned to service in his former S&C maintainer position, and if the Company has met its responsibility to accommodate Roger Moses.

Parties' Positions

28. The Briefs provide the parties' full positions. The following extracts provide a helpful summary.

IBEW

29. The IBEW alleged that Mr. Moses' medical restrictions had existed for years and did not impact his ability to work in his home position:

> 58. **The Company claims in its JSI position that it was searching for suitable accommodation for the Grievor. Yet it never offered to discuss accommodating him in any way in his own job. There is no doubt that he could do it and that he could be accommodated in such because he had done it without issue for a decade**. The other undisputed fact is that, but for the Grievor's unjust discharge, he would have remained working in the same position without any need for the Company to force any reassessment or new medicals on the Grievor. In fact, none of this was part of the earlier case or Arbitrator's orders.
>
> …
>
> 67. **The above undisputed evidence suggests that the Company did not even consider accommodating the Grievor in his own job**. The proves that the Company was never interested in such. It did not (and does not) want to return the Grievor to his old job. The only conclusion for such is because the Company lost the arbitration case. Had it not fired the Grievor improperly it could not have forced the Grievor or Union to engage in this frustrating, delayed and

[15] International Brotherhood of Electrical Workers System Council No. 11 v Canadian Pacific Railway Company, 2023 CanLII 13643
[16] IBEW Documents, Tab 1

unreasonable process – to say nothing of violating the Grievor's rights under the collective agreement and *Human Rights Act*. It is obvious that the Company did not even raise the issue of accommodation of the Grievor into his old job because it knew he could do it. It did not want him to RTW! We should not be here today. The Grievor should have been allowed to RTW as scheduled on November 15, 2024.

…

71. **It is the Company's duty to prove that the Grievor cannot physically do the job with some actual evidence. Not just claims that he is unsafe and has to go somewhere else. If they cannot prove with evidentiary support that he cannot do the job, then he should be returned to his position without delay**. If they can prove that the Grievor is not physically able to perform his tasks as an S&C maintainer, then it is their duty, due to this ruling, to accommodate him in alternate employment that does not negatively affect his pay or quality of home life, as his termination should never have happened in the first place. Anything less is discriminatory, and a violation of his Charter rights in this country. People with disabilities (if they have proof of such disability) are a recognized rights group in discrimination cases, and should be respected for the years of faithful service they have given to the company, not just thrown away like a piece of refuse that's no longer needed. Mr. Moses has been treated shabbily by CN.

(Emphasis added)

CN

30. CN argued it had accommodated Mr. Moses' permanent restrictions and that he had failed to cooperate in the process:

8. **Based on the above, CN would be extremely irresponsible if it was to return Mr. Moses to his former position, considering the new permanent restrictions that he has now. These restrictions are incompatible with the role and duties of an S&C Maintainer, and the Company will certainly not ignore or unsee them to please the Union and/or Mr. Moses**. This would go directly against our value of prioritizing safety in all of our activities. Furthermore, as the Union is well aware, the Company has a duty to ensure a safe workplace to all employees. How does knowingly placing Mr. Moses in a position where he could seriously injure himself due to his own physical restrictions (which are medically documented) be supported by his Union?

…

16. **As a reminder, CN offered Mr. Moses three suitable positions that were in line with his restrictions, which were all declined**. Neither did Mr. Moses nor the Union ever suggest any other potential position or solution afterwards. The complainant did not make contact with Carole Cousineau nor the Company following the email that she sent him on March 26, 2024 (Tab 4). The Union and

> complainant's position was clear; Mr. Moses had to be returned to his previous position, with the same schedule and working conditions as before, and no compromise would be entertained.
>
> 17. It is accepted in arbitral jurisprudence that the employee's refusal of several offers from the employer that would have addressed the restrictions to be accommodated in favor of waiting for an option that would be more desirable to him or her is sufficient for the employer to have discharged its duty to accommodate…
>
> (Emphasis added)

31. CN's Brief concluded with this summary of its position:

> 1. **Mr. Moses' permanent physical restrictions were new and incompatible with his previous position of S&C maintainer**. Returning him to this position would have represented a safety risk to himself and would have constituted a violation of our duty to ensure a safe workplace for everyone.
>
> 2. **After being informed of his new permanent restrictions, the Company evidently took steps in short order to activate the accommodation process and offered Mr. Moses three suitable positions, that he rejected**. He did not offer any other potential alternatives or solutions afterwards. Moreover, he made it clear that he would not be interested in any position outside of Macmillan yard or with a different schedule than what he had before his discharge. By taking such a drastic stance, the Claimant refused to cooperate in the accommodation process, contrary to his legal obligation under the Canadian Human Rights Act.
>
> (Emphasis added)

Applicable Principles

32. This supplementary arbitration requires an application of duty to accommodate principles when determining whether CN respected the order to reinstate Mr. Moses.

33. The parties have significant experience with the duty to accommodate, including in multiple cases before the arbitrator[17]. CROA 4503[18] reviewed the various principles at play and emphasized the importance of the parties' process:

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[17] See, for example, AH815 - International Brotherhood of Electrical Workers (System Council No. 11) v Canadian National Railway Company, 2023 CanLII 44118; AH793 - Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 102424; and AH734 - Teamsters Canada Rail Conference v Canadian National Railway Company, 2022 CanLII 5833.

[18] Canadian Pacific Railway Company v Teamsters Canada Rail Conference, 2016 CanLII 85730

> 7. An arbitrator must examine the entire process, including the assistance provided by the trade union and the accommodated employee, plus the specific factual context, when deciding if an employer has been sufficiently diligent in pursuing accommodation opportunities.

34. In its Reply Brief, CN contested the IBEW's suggestion that CN's Labour Relations (CNLR) department had been fully involved in the OHS process:

> Paragraph 43: As explained previously, this fitness for duty assessment is routinely done by OHS for employees who have been off work for a long period of time. Also – the Union mentions that "It is clear that LR is fully involved in this review" and suggest that they (LR) should have stopped "this intensive, unilateral, unannounced and unnecessary medical review". **To be clear, Labour Relations are never involved in OHS' activities/assessments; we are simply notified once it's completed**. A proof of this is the fact that Mr. Jason Sommer has asked LR manager Pier-Luc Montgrain several times for an update on Mr. Moses' fitness for duty assessment. My (Pier-Luc Montgrain) response was always the same; this is entirely up to OHS and I am not privy to any of that information. **Another fact supporting this is that today (August 20, 2024), we (Labour Relations), still don't have access to Mr. Moses' medical file/information, other than the documents that the Union attached in their exhibits**.
>
> (Emphasis added)

35. In AH822[19], the arbitrator acknowledged the challenges accommodation cases pose for labour relations departments. OHS must protect the confidentiality of employees' medical records. This means that, unlike in discipline or interpretation cases, CNLR's analysis depends entirely on conclusions provided to it by others:

> 34. **This case illustrates the challenges for CPLR when its decisions rely on conclusions provided to it by others. The medical and accommodation decisions are processed elsewhere than in CPLR**. This makes it difficult for CPLR to assess, from a legal perspective, the case it may end up having to plead at arbitration. Nonetheless, there are ways around this and, ultimately, CP as an entity remains bound by the actions taken.
>
> …
>
> 59. **As mentioned above, Mr. X's situation placed CPLR in a difficult position. It acted based on OHS' conclusions. For privacy reasons, CPLR**

[19] International Brotherhood of Electrical Workers System Council No. 11 v Canadian Pacific Railway Company, 2023 CanLII 13643.

> **did not have access to the medical information which would have allowed it to analyze the situation from a legal perspective**.
>
> 60. Nonetheless, CP remains bound to respect its legal obligations regardless of those challenges. The IBEW highlighted at its earliest opportunity its concerns about the conflicting medical evidence.
>
> (Emphasis added)

36. There are ways for the parties to manage these challenges. As happened in AH822, the parties can work together to ensure that the arbitrator has a full Record, including the key medical information at the heart of the dispute:

> 33. The parties worked diligently together to ensure a full Record existed for this arbitration. When they had any challenges, they contacted the arbitrator for case management conferences. This cooperation allowed the parties to plead this matter efficiently and without any evidentiary surprises.

37. The tripartite process arising from the duty to accommodate also allows the parties to engage in a full discussion, including about any medical restrictions[20]:

> 78. The University did not persuade the arbitrator that Manulife was solely responsible for determining whether the employee could be safely returned to work. The University remained responsible to fulfill its duty to accommodate. That duty cannot be contracted out to Manulife.
>
> …
>
> 82. The University did not persuade the arbitrator that the fact it did not receive an actual copy of the IME somehow insulated it from its accommodation responsibilities. While it might not have received the report, Manulife kept it apprised of the employee's situation monthly. The IUOE noted that nothing prevented the University from obtaining a copy of the IME provided it treated it as it did all other employee medical information. Such medical information remains protected and only a few key people, like JHH, would have access to it.
>
> 83. **The IUOE further noted that even if the arrangement between Manulife and the University prevented access to the report, nothing prevented the University from asking the employee for his consent to review the IME. An employee does have an obligation to assist the employer as it attempts to make an informed decision based on his medical evidence.**

[20] International Union of Operating Engineers, Local 772 v University of Ottawa, 2018 CanLII 105364

> 84. Even more fundamentally, the University remains responsible for making accommodation decisions based on all the medical evidence. As Mr. McGee noted in answer to a question during final argument, if the employee had had a 100% total recovery, but Manulife did not tell the University, this would not constitute a defence to a failure to return that employee back to work. Any issue would instead be between the University and Manulife.
>
> (Emphasis added)

38. AH822 highlighted that ways exist for the parties to discuss their differences over the medical evidence [Footnotes omitted]:

> 63. **As noted above, the tripartite process could have provided CP with a full appreciation of the challenges arising from the contradictory medical evidence. If further medical investigation had taken place, there might have been some restrictions placed on Mr. X's current position which would still allow him to work. CP's medical evidence suggested that Mr. X would have had to perform every single element of his position. That is not how accommodation works.**
>
> …
>
> 65. **The Record remains silent on any attempts CP made to meet with the IBEW to review the medical evidence, the restrictions, if any, and possible accommodations**. Perhaps CP felt bound by the conclusions coming from OHS and CPDM. Perhaps it felt that the RTWA allowed it to discount all the medical evidence Mr. X provided as he dutifully fulfilled every single one of CP's medical requests.
>
> 66. **But instead of pursuing the tripartite process to allow for an examination of all the relevant facts, CP instead unilaterally placed Mr. X into a lower paying job outside the bargaining unit**. The arbitrator has already noted above that the RTWA does not exempt CP from fulfilling its duty to accommodate obligations, as it has shown in the past it can do. The duty to accommodate must first resolve the contradictions in the medical evidence.
>
> (Emphasis added)

39. In this case, the tripartite process might have examined why, despite Mr. Moses' medical evidence and previous experience performing his tasks, CN felt it could not return him to his position.

40. In AH835[21], the arbitrator emphasized the importance of the accommodation process focusing first on the employee's home position before exploring alternatives [Footnotes omitted]:

> 79. The work trial seemingly took place to confirm Mr. Kirk had restrictions. But the WSIB had long before identified those restrictions. The issue was whether CPKC could accommodate them.
>
> 80. **CPKC did not attempt to accommodate Mr. Kirk's ladder restrictions in the ways the WSIB had suggested. Instead, CPKC seemly maintained its position that it could not accommodate Mr. Kirk without undue hardship. One will never know whether a proper work trial, incorporating the WSIB's recommended accommodations, might have allowed Mr. Kirk to fulfil the essential duties of his position. Mr. Kirk should not be prejudiced for this failure to attempt to accommodate him**.
>
> 81. **Similarly, CPKC continued to attempt to find other positions for Mr. Kirk rather than implement the WSIB's accommodation measures**.
>
> 82. **The WSIB clearly described the required accommodation. But CPKC never attempted it. Had it done so, the evidence gathered might have led to changes in the required accommodation. The WSIB itself had described such changes as tweaks which are a natural part of any accommodation process**. But without a proper attempt to accommodate, the arbitrator has no evidence on which to evaluate what might have been.
>
> (Emphasis added)

41. Clearly, obvious situations exist where the parties agree the employee can never return to the home position. The analysis then focuses on whether the employer can accommodate the employee without incurring undue hardship. But cases like AH835 illustrate that the first step in the accommodation analysis must examine the home position unless the parties agree that option no longer exists.

42. The arbitrator will apply these general principles to Mr. Moses' situation.

Decision

43. CN did not demonstrate why it could not return Mr. Moses to his position. The arbitrator has described the challenges CNLR faces in this area. CNLR acted consistently with the information provided to it. The arbitrator also referenced other cases and how parties can manage this challenging area.

[21] International Brotherhood of Electrical Workers (System Council No. 11) v Canadian Pacific Kansas City Railway, 2023 CanLII 73603

44. The Record does not support CN's conclusion that Mr. Moses' restrictions prevented him from returning to his original position. Presumably, CN came to this conclusion, in part at least, based on its generic 2020 analysis of the S&C Maintainer position. It is unclear why that document took precedence over OHS' mention of a field assessment.

45. The Record does not disclose why CN seemingly discounted the fact that Mr. Moses had already been performing the essential duties of his position, despite his restrictions. As noted above, Mr. Moses' medical evidence indicated:

> Fit for modified/alternate duties from 2024/01/04 to indefinite "as he has already had these restrictions for years and is not expected to change".

46. Neither does the Record indicate why CN chose to discount Mr. Moses' physician's opinion that his restrictions did not prevent him from doing his S&C Maintainer job:

> In conclusion, to the best of my knowledge and based on information provided to me, including the position description accompanying the musculoskeletal assessment form, **I do not see a medical reason as to why Mr. Moses cannot continue in his position of Signals and Communication Maintainer**. I would recommend that he return to this position without further delay and with the aforementioned restrictions in place, with the clarification that kneeling/squatting/crouching is not absolutely forbidden but rather should be minimized and avoided if and when possible.
>
> (Emphasis added)

47. This is not to say that an employee's medical evidence automatically binds an employer. It is just one element the parties will consider during a thorough duty to accommodate analysis.

48. But for CN to reject Mr. Moses' medical evidence, one would expect to find contrary medical opinions[22]. Instead, the OHS records quoted above seem to support Mr. Moses' position and provided CN with relevant information it might want to explore concerning his home position:

> - EE mentioned that he didn't have to do crouching/kneeling at work for past 9 years;

[22] Both parties produced the 2013 FAF. CN did not otherwise file any of the OHS records. The IBEW filed what the arbitrator understands are extracts from those records.

- EE would like to be able to show the function on how he can perform his task without any issues;
- No change in restriction. Field assessment suggested but EE has had no proof given to LR that he has had these restrictions before[23];
- Also, EE reports that he has been accomplishing 100% of his job's duties within those restrictions for the past 9 years without any issues.

49. In short, in addition to the medical evidence Mr. Moses provided to CN, the OHS records indicate that he had advised them he had been doing the essential tasks of his position for 9 years, despite his restrictions. The 2024 restrictions appear very similar to those from 2013. The temporary or permanent nature of the restrictions does not impact the need to analyze whether Mr. Moses could still do his job.

50. The arbitrator notes that for similar restrictions back in 2013, CN successfully accommodated Mr. Moses in his home position. The Record does not disclose why CN could not do that again, or at least try, based on the updated medical evidence in its possession.

51. CN's conclusion raised several questions about the duty to accommodate process in this case. Why did CN not proceed with what the OHS called a "field assessment" if it had concerns? Did CN somehow fault Mr. Moses for not providing CNLR with evidence about his 2013 restrictions when OHS clearly had this information in its files?

52. Similarly, why did OHS not speak to Mr. Moses' physician? It is unclear if OHS disputed that medical opinion or just did not consider it. The only conclusion the arbitrator found in the Record on Mr. Moses' fitness came not from the OHS records but from Ms. Cousineau's March 26, 2024 letter[24].

53. If OHS disputed the medical evidence, something which the arbitrator cannot find in its records, then why not discuss with Mr. Moses or the IBEW the possibility of an independent medical examination?

54. In a duty to accommodate process, an employer cannot start by offering alternative positions, such as the position in Edmonton it offered to Mr. Moses. Instead, the first step

[23] The OHS records describe the 2013 accommodation event: See IBEW Documents, Page 64/191 (2013-08-01 Case Notes entry) and 74/191 (2024-01-09 Medical Notes entry). CN also produced the 2013 medical evidence: CN Documents, Tab 3.
[24] CN Documents, Tab 4.

must examine whether the employee can return to the home position[25]. Before concluding no return is possible, an employer must consider what reasonable accommodations might be made to that original position without resulting in undue hardship. This analysis may include a trial period or "field assessment", a description OHS used in its notes.

55. The arbitrator therefore concludes that the original reinstatement order stands. The evidence does not support CN's decision to refuse to reinstate Mr. Moses back to his home position.

DISPOSITION

56. For the above reasons, the arbitrator accepts the IBEW's position that CN has failed to implement fully AH837's reinstatement order. The arbitrator orders CN to respect that order forthwith. CN shall also make Mr. Moses whole, including with interest, for the delay in his reinstatement.

57. The arbitrator remains seized.

SIGNED at Ottawa this 27th day of August 2024.

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Graham J. Clarke
Arbitrator

[25] See AH835, supra.